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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH WILLIAM KIPP,

Defendant and Appellant.

G051564

(Super. Ct. No. 13CF2836)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
W. Michael Hayes, Judge. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Heidi
Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Joseph William Kipp used a gun to rob a bank. Following his arrest, he told the police the gun was only a water pistol. However, based on surveillance photos of the robbery, a firearms expert at appellant's trial testified the gun was real. The jury agreed, finding a firearm allegation true. Appellant contends the expert's testimony should have been excluded because it was unreliable and speculative, but we disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2011, appellant entered a U.S. Bank in Santa Ana and handed the teller a note that read, "This is a robbery. I have a gun. No dye packs." Appellant also lifted his shirt to show the teller a gun he had tucked into his waistband. After the teller handed over about \$2,600 to appellant, he fled the bank.

Two months later, he was arrested and interviewed by Detective Christopher Faulkner. During the interview, Faulkner showed appellant a still photo that was taken from the surveillance video of the robbery. The photograph shows appellant lifting up his shirt and revealing the handle of the gun he had in his waistband. When Faulkner asked appellant about the gun, he said it was an "old-school water pistol" he had purchased at a 99 Cent Store. Appellant said he spray painted the gun black to make it look real and then threw it away after the robbery. The gun was never recovered by the police.

Appellant was charged with robbery while personally using a firearm within the meaning of Penal Code section 12022.53, subdivision (b). For purposes of that section, the gun in question must be a real firearm, not an imitation weapon or a toy such as a water pistol. (Pen. Code, § 16520, subd. (a) [former § 12001, subd. (b)]; *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435.) However, the authenticity of the gun can be shown by either direct or circumstantial evidence. (*People v. Monjaras, supra*, 164 Cal.App.4th at pp. 1435-1436.)

In order to prove appellant's gun was real, the prosecution called Detective Faulkner as an expert witness on firearms. Faulkner testified that during his 24 years as a police officer he has handled and fired hundreds of handguns. He has also been trained to assist other officers in the proper use, handling and identification of firearms. Based on the still photo of appellant lifting up his shirt in the bank, Faulkner testified the gun in appellant's waistband was a striker-fired, semiautomatic handgun. Faulkner was not one hundred percent sure the gun was real, but in his opinion the gun looked like a Heckler & Koch P7 pistol, given the unique shape of the grip.¹ While admitting appellant's gun *could* have been a water pistol, a gun replica or even a block of wood fashioned to look like a gun, Faulkner did not believe that was the case.

In response to Faulkner's testimony, the defense called forensic firearms examiner Patricia Fant as an expert witness. Fant did not think the gun shown in appellant's waistband was a Heckler & Koch P7 pistol. However, she admitted the gun had the appearance of a firearm and did not resemble a water pistol.

In the end, the jury found the firearm allegation to be true. Because appellant was a third-strike offender, the trial court sentenced him to 40 years to life in prison, including a mandatory 10-year term for the firearm enhancement.

DISCUSSION

Appellant argues the trial court should have excluded Faulkner's testimony about the nature of his gun because it was unreliable, speculative and undermined his right to a fair trial. Appellant's argument stems from the fact Faulkner's testimony was based on a photograph of his gun as opposed to the actual gun, and he was unable to offer a definitive opinion as to whether the gun was real. We find Faulkner's testimony was properly admitted into evidence.²

¹ Faulkner was personally familiar with this type of pistol, having owned one in the past.

² In light of this finding, we need not determine whether appellant's trial counsel was ineffective for failing to object to Faulkner's testimony on the specific grounds proffered on appeal.

In arriving at their opinions, expert witnesses may utilize any materials “that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates” (Evid. Code, § 801, subd. (b).) This rule is designed to prevent reliance on unreliable or speculative information. (*People v. Sanchez* (2016) 63 Cal.4th 665, 678.) But it does not preclude experts from relying on photographic evidence that accurately depicts material evidence in the case. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 321-322; *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 792.) In fact, “[i]t is not uncommon for experts to rely on photographs of an item in offering their opinions.” (*United States v. Joseph* (E.D. La. 2001) 2001 U.S. Dist. LEXIS 7039, p.*3, citing *United States v. Brink* (3rd Cir. 1994) 39 F.3d 419, 421, fn. 3 [allowing firearms expert to testify the gun pictured in surveillance photographs of robbery was a revolver]; and *United States v. Quinn* (9th Cir. 1994) 18 F.3d 1461, 1465 [affirming robbery conviction because, inter alia, the gun used in the robbery was identified by experts from surveillance photos as being similar to a gun that was found in the home of the defendant’s girlfriend].)

Here, there is no question the photograph Faulkner relied on in forming his opinions accurately represented the gun appellant used during the robbery. While only part of the gun is visible in the photograph, Faulkner did not personally examine the gun, and the gun *could* have been a water pistol, those factors go to the weight, not the admissibility of Faulkner’s opinions. (*People v. Horning* (2004) 34 Cal.4th 871, 900-901; *People v. Bolin, supra*, 18 Cal.4th at p. 322.) They do not compel the conclusion Faulkner’s testimony should have been excluded as being unreliable or speculative. (See *People v. Sloss* (1973) 34 Cal.App.3d 74, 86-87 [given his experience as a narcotics investigator, police officer was properly allowed to testify that object shown in appellant’s hand in photo was a marijuana cigarette].)

Relying on *People v. Prince* (2007) 40 Cal.4th 1179, appellant also contends Faulkner’s testimony “had an improper and excessive influence on the jury”

because it amounted to expert testimony on whether the firearm allegation was true, thereby invading the jury's province to decide that issue. As stated in *Prince*, "an expert's opinion that a defendant is guilty is both unhelpful to the jury – which is equally equipped to reach that conclusion – and too helpful, in that the testimony may give the jury the impression that the issue has been decided and need not be the subject of deliberation." (*Id.* at p. 1227; see also *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651-659, disapproved on other grounds in *People v. Vang* (2011) 52 Cal.4th 1038, 1047, fn. 3 [condemning expert testimony that simply tells the jury how the case should be decided].) But Faulkner did not testify the firearm allegation was true. He simply offered his *opinion* on the authenticity of appellant's gun, from which the jury – along with all of the other evidence presented in the case – could decide the truth of the allegation. Therefore, even though Faulkner's opinion encompassed an ultimate issue in the case, it was permissible. (*Ibid.*) It did not constitute improper expert testimony or undermine appellant's right to a fair trial.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.